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No. _____

In The

Supreme Court of the United States

KIM GATENA,

Petitioner,

vs.

COUNTY OF ORANGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does Orange County's Public Nudity Ordinance violate the First Amendment because it expressly exempts and provides preferential treatment for "bona fide nude performances" which contain a "genuine message"?

Would an exotic dancer of ordinary intelligence understand what the county's exemption for bona fide nude performances with a genuine message means and, if not, is the exemption unconstitutionally vague in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDING

The parties listed in the caption are the only parties to the proceeding, specifically Orange County, Florida and Kim Gatena.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 2

A. Procedure 2

B. Statement of the Facts 4

Reasons for Granting the Writ 13

I. Orange County's Public Nudity Ordinance is a content or viewpoint based law because it provides preferential treatment for nude performances which are deemed "bona fide" with a "genuine message." 13

II. The bona fide performance exemption is unconstitutionally vague because no person of common intelligence could discern the words' meaning; nor can a police officer on the beat be expected to understand how this subjective verbiage is to be constitutionally and criminally enforced 18

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES CITED:

Ashton v. Kentucky, 384 U.S. 195 (1966) 21

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)... 3, 14, 17

Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 20

City of Chicago v. Morales, 527 U.S. 41 (1999) 19

City of Erie v. Pap's, ___ U.S. ___, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000)..... 3, 13, 14, 15

City of Ladue v. Gilleo, 512 U.S. 43 (1994)..... 16

Coates v. Cincinnati, 402 U.S. 611 (1971) 19

Cohen v. California, 403 U.S. 15 (1970) 24

Erhardt v. State, 463 N.E.2d 1121 (Ind. 4th DCA 1984), rev. 468 N.E.2d 224 (Ind. 1984)..... 17

Erznoznik v. Jacksonville, 422 U.S. 205 (1975) 20

Farkas v. Miller, 151 F. 3d 900 (8th Cir. 1998)..... 17

Gatena v. Orange County, 80 F.Supp. 2d 1331 (M.D. FL 1999) 1, 17

Gooding v. Wilson, 405 U.S. 518 (1972).....20, 21

Grayned v. City of Rockford, 408 U.S. 104 (1972)...19, 20

Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955) 20

Hynes v. Oradell, 425 U.S. 610 (1976) 20

Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968) 20

TABLE OF AUTHORITIES – Continued

Page

J & B Entertainment, Inc. v. City of Jackson, 152 F.3d 362 (5th Cir. 1998) 17

Kolender v. Lawson, 461 U.S. 352 (1983) 19

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 21, 23

Nakotomi Inv., Inc. v. City of Schenectady, 949 F.Supp. 988 (N.D. N.Y. 1997) 17

New York Times Co. v. Sullivan, 376 U.S. 265 (1964) 13

Regan v. Time, Inc., 468 U.S. 641 (1984) 16

Reno v. ACLU, 521 U.S. 844 (1997) 19, 20

Sable Communications of California, Inc. v. Fed. Communications Comm., 492 U.S. 115 (1989) 16

Salem Inn, Inc. v. Frank, 501 F.2d 18 (2nd Cir. 1974) 22

Salem Inn, Inc. v. Frank, 522 F.2d 1045 (2nd Cir. 1975) 17

Smith v. Goguen, 415 U.S. 566 (1973) 20

State v. Baysinger, 397 N.E.2d 580 (Ind. 1979) 17

Superior Films, Inc. v. Department of Education, 346 U.S. 587 (1954) 20

Texas v. Johnson, 491 U.S. 397 (1989) 16

Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994) 17

TABLE OF AUTHORITIES – Continued

Page

United States v. O'Brien, 391 U.S. 367 (1968) 16

United States v. Playboy Entertainment Group, Inc., ___ U.S. ___, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) 16, 17

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 21

STATUTE CITED:

28 U.S.C. Section 1254 1

UNITED STATES CONSTITUTION CITED:

Fifth Amendment, United States Constitution 1

First Amendment, United States Constitution .... *passim*

Fourteenth Amendment, United States Constitution 2

RULE CITED:

Rule 30(B)(6), Fed.R.Civ.P. 7

OTHER AUTHORITIES CITED:

Section 1-9, Orange County Code 5

Section 26-26, Orange County Code .. 2, 3, 5, 18, 22, 23

TABLE OF AUTHORITIES – Continued

Page

APPENDIX

Appendix A – Opinion of the United States Court of Appeals for the Eleventh Circuit Filed July 11, 2000 ..... 1a

Appendix B – Order of the District Court, Middle District, Orlando, Florida Filed November 5, 1999 ..... 5a

Appendix C – Order of the United States Court of Appeals for the Eleventh Circuit Filed September 18, 2000 ..... 31a

Appendix D – Certified Copy of Section 26-26, Orange County Code 33a

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Kim Gatena, respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, *Gatena v. Orange County*, Case Number 99-14905A (11th Cir. 2000) (App. A). The opinion of the District Court is reported and can be found at *Gatena v. Orange County*, 80 F.Supp. 2d 1331 (M.D. FL 1999) (App. B).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on July 11, 2000 (App. A). The Court of Appeals denied a timely petition for rehearing on September 18, 2000. (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment One to the United States Constitution states in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, . . . " Amendment Five provides in relevant part, "no person shall . . . be

deprived of life, liberty, or property, without due process of law; . . . " Both of these provisions are applicable to the states through the Fourteenth Amendment to the United States Constitution which provides in part, "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . "

STATEMENT OF THE CASE

A. Procedure

Kim Gatena filed a two-count complaint seeking injunctive and declaratory judgment relief challenging the constitutionality (both facially and as applied) of Orange County, Florida's public nudity ordinance which criminalizes nude expression unless it is deemed "bona fide." The lawsuit focused in principal part upon the county's exemption for bona fide nude performances. The exemption permits those performances which constitute:

> [p]art of a **bona fide live communication**, demonstration or performance by such person wherein such nudity is expressive conduct **incidental to and necessary for** the conveyance or communication of a **genuine message** or public expression, and is **not a guise or pretense** utilized to exploit nudity for profit or commercial gain.

(App. D; § 26-26(f)(2), Orange County Code) (Emphasis added).

As can be seen by reviewing §§ 26-26(b)(2) and (c), the underlying rationale of the ordinance is that public nudity is indecent unless it is "bona fide."

Ms. Gatena's challenge focused on why preferential treatment was being given to "bona fide performances" and how the county and the police intended to enforce the ordinance. Therefore, Ms. Gatena took several depositions of people knowledgeable of both the purpose and enforcement of the ordinance. These witnesses included a county representative with the most knowledge of the application and meaning of the ordinance and its listed exemptions; the lawyer for the police agency responsible for counseling the police in enforcing the ordinance; and, the director of the police agency responsible for enforcing the ordinance. The District Court entered summary judgment in favor of the county finding that the ordinance was not content or viewpoint based and that the exemption was not unconstitutionally vague. The District Court stated that this court's decision in *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), controlled the question and provided that preferential treatment for certain types of nude expression does not violate the First Amendment[1]. An appeal was taken to the Eleventh Circuit Court of Appeals. The Eleventh Circuit Court affirmed the District Court's ruling in a four-page unpublished opinion. A timely petition for rehearing was likewise denied.

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[1] As set forth within this petition, this court has never specifically reached this issue. This is abundantly clear by reviewing the debate in *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000).

B. Statement of the Facts

Kim Gatena has been an exotic dancer for much of her adult life. She wants to perform nude in either an adult entertainment establishment or in a play or skit. During her deposition, Ms. Gatena provided the county with numerous examples of different types of performances she wanted to present. By providing various examples of the type of entertainment she would like to offer, Ms. Gatena was hoping that her performance would fall within the county's bona fide performance exemption. The problem is, Ms. Gatena does not want to risk arrest to find out what the bona fide performance exemption means.

> Q. Now is it necessary for you to be nude in plays? Is that your focus? You want to display your nudity?
>
> A. It's not necessary, but I don't want to be limited to where I can't. That's what I'm trying to find out. What is legal? What isn't? That's why I'm coming with this lawsuit. I want to find out.

(Ms. Gatena's deposition) (RIII-28-79).

Ms. Gatena also believes that there should be no double-standard with the county deciding what is art and what is not. Ms. Gatena has never been told what factors the county uses to determine whether a performance is

bona fide, and she does not want to subject herself to a possible sixty-day jail term to find out[2].

The county attorney quizzed Ms. Gatena as to why she thought the ordinance was vague.

> Q. Tell me every reason why you claim that the ordinance is vague.
>
> A. Number one, I really don't understand it. I **don't understand who says it's bonafide or not bonafide**. And to me, I mean, on these – on what I want to do, it is expressive. It's expressing the communications of what my genuine message would be for that skit. But really, it's hard to understand it and it's very, very broad. It doesn't really – just like I said with the doctor, you know, this nude deal that – what is her name?
>
> Q. Nicole Kidman?
>
> A. Nicole Kidman, same thing[3]. I just really don't understand it. Who says that it's bonafide or not bonafide?

(Ms. Gatena's deposition) (Emphasis added) (RIII-28-87).

* * *

> A. Right. *And why is it different than a play at Bob Carr Theater where all the rich people can afford to buy the tickets and wear the nice clothes and afford to buy the nice drinks. So it's*

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[2] This ordinance is criminal in nature; a violation of which can result in a sixty-day jail term. See § 26-26(g) and § 1-9, Orange County Code.

[3] Ms. Gatena is referring to a play Nicole Kidman appeared nude in called "The Blue Room." (RIV-41-29).

for the rich but it's not for the everyday Joe? I just don't understand that.

Q. Is there anything else you don't understand about the ordinance?

A. It's pretty hard to understand, period, *unless you're a dang lawyer.*

(Ms. Gatena's deposition) (Emphasis added) (RIII-28-87-88).

It is clear from reading the ordinance in its entirety that it is discriminatory and arbitrary in nature. In this regard, Ms. Gatena summed up in her own words why the ordinance is unconstitutional.

A. *I think it should be fair.* I think if they can do it at a play at Bob Carr, I can do it at a theater or adult entertainment establishment.

(Ms. Gatena's deposition) (Emphasis added) (RIII-28-96).

The county attorney showed Ms. Gatena a definition of the word bona fide as it appears in Webster's dictionary, and asked her what it was about the definition that she did not understand.

Q. Would you read the definition of bonafide. [from Webster's]

A. "Done or made in good faith, sincere, authentic, genuine." Okay.

Q. So do you understand what bonafide means, the word bonafide?

> A. Done or made in good faith. Okay. So prohibited by this section because it constitutes a part of a done-in-good-faith live communication. **And there again, it would depend on what your good faith is compared to what my good faith is, right?**

(Ms. Gatena's deposition) (Emphasis added) (RIII-28-91-92).

* * *

> A. I guess I don't understand who gets to decide whether it's a bonafide live communication or not, whether it's an expressive conduct necessary for the conveyance of communications. To me, because I am an artist and because I like to dance, I find that to be a genuine message to the public because I think it conveys freedom. It conveys seduction. It can convey a part in a play. But who – **I don't understand who gets to decide that**. And what are the – *can you have 10 percent nudity*? Can you have – do see what I'm saying?

(Ms. Gatena's deposition) (Emphasis added) (RIII-28-117).

To add some life to the challenge, a subpoena was sent to the county to designate a witness with the most knowledge of the meaning and application of the bona fide performance exemption. Pursuant to Rule 30(B)(6), Fed.R.Civ.P., an addendum to the subpoena listed ten separate subjects which would be discussed during the deposition. The county's representative explained that

the ordinance does not exempt nude theatrical performances but exempts what are termed "bona fide" performances.

> A. **What I told you is the ordinance does not address nude theatrical performances.** It does not use that language. We've read through this thing and there is no reference to nude theatrical performances anywhere in the ordinance.

(Deposition of McClendon) (Emphasis added) (RIV-49-41).

The county's representative further explained that if Ms. Gatena put on a nude or theatrical performance that she thought was done in good faith and the police disagreed – presumably she could be arrested and taken to jail. Distilled to its essence, the county's position is that the judiciary should decide what is and what is not a bona fide performance.

> Q. How about if we changed it to: How does the MBI[4] determine that a nude performance or theatrical performance is exempt under Section 26-26?
>
> A. Same situation. They don't determine it. They – "determining," you're using that word. I'm assuming you used that word for a purpose. **That determination is made by the judiciary.** It's not made by anybody else.

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[4] The MBI is an acronym for the Metropolitan Bureau of Investigation which is charged with enforcing this ordinance.

Q. So those judges over there make that determination?

A. It will be a judge or the jury that will decide whether a performance complies or it doesn't comply with this ordinance.

(Deposition of McClendon) (RIV-49-42) (Emphasis added).

The county's designee further explained that if Ms. Gatena was confused about the application of the exemption, she could hire a lawyer. However, if it turns out the lawyer does not understand the exemption either, Ms. Gatena would have to defend herself in court.

Q. What happens if Steve Mason – I'm her lawyer – and I tell her I think it's a beautiful performance. It's bona fide. It's genuine. You have a beautiful body. And I think it's a humorous skit. It's protected under the First Amendment. And the police think that I don't know what I'm talking about *and they arrest her*?

(Objection omitted)

A. What do you mean "what happens?" What's the question? What do you want me to respond to?

Q. How does she deal with that –

A. She'll have to –

Q. What do you call it – the sword of Damocles? How does she deal with that?

(Objection omitted)

A. She and her attorney would have to defend themselves in a court of law under that circumstance.

(Deposition of McClendon) (Emphasis added) (RIV-49-44-45).

The county also believes that the performer's formal training and acting experience is part of the equation to determine whether the performance is bona fide.

Q. In determining whether or not the performance is exempt under (f)(2), does the performer have to have any formal training in acting or theater?[5]

(Objection omitted).

A. Again, that's part of that totality of that investigation that would be conducted by somebody like the MBI, or a sheriff, or deputy. **Those are probably things that would be mitigating or supporting circumstances.**

So I couldn't say when they do their work, whether they would be interested in that or

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[5] The county attorney likewise believes that Ms. Gatena's formal training is germane to the analysis. The following questions were posed to Ms. Gatena during her deposition.

Q. *But you've never been in any plays* aside from the play when you were nine years old?

A. No. **Does that matter?** It's something that I'd like to do.

Q. But you've never been in any?

A. Does that matter?

Q. **Yes.**

(Ms. Gatena's deposition) (Emphasis added) (RIII-28-119).

> not. They might be. That's their responsibility, their issue, their area.

(Deposition of McClendon) (Emphasis added) (RIV-49-57-58).

Although the county used the definition of bona fide from Webster's in deposing Ms. Gatena, the county's designee testified at his deposition that this definition should not be relied upon in reading the ordinance.

> Q. So the three definitions of bona fide that you took from "Webster's Seventh New Collegiate Dictionary" –
>
> A. Yes.
>
> Q. – is that what people should rely upon in reading the ordinance?
>
> A. No.

(Deposition of McClendon) (Emphasis added) (RIV-49-71).

The discussion focused on what bona fide means and, if it means good faith, how that is to be applied.

> Q. Let's see if I can make it clear. Does it mean – meaning *good faith* – does it mean what I think in my heart or does it mean what a reasonable person would think?
>
> (Objection omitted)
>
> A. It means what it means, again. **It means different things depending on the context in which it's used.**

Q. Would it mean different things to different people depending upon the circumstances?

(Objection omitted)

A. **I think words mean different things to different people**. That's why we have wars. Again, it depends on how it's used, in the context it's used in, and the sense that it's used in, as to whether you're talking about an individual, a group, or a country.

(Deposition of McClendon) (Emphasis added) (RIV-49-68-69).

The deposition of the director of the police agency principally responsible for enforcing the ordinance was also taken. He testified that one of the main questions in determining whether a performance is bona fide is deciding what is in the heart and mind of the person performing.

A. **I did not say that is in this written document**. I am trying to – you asked me the question how is your client to know. So I am trying to help you with your question, how is your client to know. *The first step is what is in the mind and heart of the person who is about to engage in public nudity.* If they know that they are doing this as a ruse to exploit nudity for profit or commercial gain, they know that. They've answered their question right off the bat. That's not an issue of what's in the law. I am helping you with your question about what you tell your client.

(Deposition of Lutz) (Emphasis added) (RIV-46-18).

The director also stated that theatrical performances may *not* necessarily be exempt under the ordinance.

> Q. So I am correct that theatrical productions are exempt from the Public Nudity Ordinance even though they are not specifically mentioned by name under Subsection F(2)?
>
> (Objection omitted)
>
> A. No. I don't think you are correct then because you could have a theatrical play that was nothing more than a guise or pretense utilized to exploit nudity for profit[6] or commercial gain. You have to read every word in this exemption and weigh every word before making a decision. So I cannot say that what you said is correct.

(Deposition of Lutz) (Emphasis added) (RIV-46-6-7).

REASONS FOR GRANTING THE WRIT

I. Orange County's Public Nudity Ordinance is a content or viewpoint based law because it provides preferential treatment for nude performances which are deemed "bona fide" with a "genuine message."

This court should hear this case for a number of reasons. First, this is a case of wide-spread importance as reflected by this court's debate in *City of Erie v. Pap's A.M.*

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[6] Most, if not all commercial productions are performed for profit or pecuniary gain. A production does not lose its First Amendment protection because it was performed for profit. *New York Times Co. v. Sullivan*, 376 U.S. 265-266 (1964).

where it discussed (but did not decide) whether preferences for certain types of nude expression violated the First Amendment. Second, the ordinance violates this court's repeated pronouncements that content or viewpoint laws violate the First Amendment. Third, there is a split among the lower courts whether such preferential treatment violates the constitution. Finally, it violates long-standing precedent from this court that overly vague laws violate due process and especially when First Amendment rights are implicated.

This Spring, the Court entered its opinion in *City of Erie v. Pap's*, ___ U.S. ___, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). One of the issues was whether Erie's Public Nudity Ordinance was unconstitutional because the Erie authorities *may* have intended to enforce the ordinance against adult nightclub establishments only. As evidenced by the oral argument transcript (filed with the lower court), several of the justices expressed interest in whether this type of discriminatory enforcement violated the First Amendment. However, when the court issued its opinion, a majority of the justices found that the issue was not ripe because the evidence presented was too tenuous to support the argument. The plurality characterized the basis for the challenge as "[a]n alleged illicit motive." *Pap's*, 120 S.Ct. at 1392. The plurality also found that the Erie ordinance on its face banned all public nudity and not just nudity deemed undesirable.

> The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. (Cite omitted). By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; **rather, it**

> **bans all public nudity**, regardless of whether that nudity is accompanied by expressive activity.

Id. at 1391 (Emphasis added).

* * *

> Respondent's argument that the ordinance is "aimed" at suppressing expression through a ban on nude dancing – an argument that respondent supports by pointing to statements by the city attorney that the public nudity ban was not intended to apply to "legitimate" theater productions – is really an argument that the city council also had an illicit motive in enacting the ordinance. As we have said before, however, this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive.

Id. at 1392.

In his concurrence, Justice Scalia explained that the issue was too ephemeral to be ruled upon. "There is no basis for the contention that the ordinance does not apply to nudity in theatrical productions such as Equus or Hair. **Its text contains no such limitation.**" *Id.* at 1401 (Emphasis added). However, two justices, Ginsberg and Stevens, would have declared Erie's ordinance unconstitutional on this ground alone. *Id.* at 1411-1412.

Ms. Gatena's challenge presents a golden opportunity for this court to address the issue head-on. This case does not present an ephemeral challenge. Instead, Orange County, in rather blatant form, exempted from its

public nudity ordinance those nude performances considered "bona fide." The exemption permits those performances which constitute "part of a *bona fide* live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a *genuine message* or public expression, and is not a *guise or pretense* utilized to exploit nudity for profit or commercial gain." (RI-10-11) (Emphasis added).

Content-based speech regulations are those which permit the government to discriminate on the basis of the content of the message. *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) [content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others]; *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) [under the statute one reproduction is allowed and another prohibited because *government determines that one message is newsworthy* or educational].

This court has repeatedly ruled that content-based laws are subject to exacting or strict scrutiny. See *United States v. Playboy Entertainment Group, Inc.*, ___ U.S. ___, 120 S.Ct. 1878, 1886, 146 L.Ed.2d 865 (2000); *Sable Communications of California, Inc. v. Fed. Communications Comm.*, 492 U.S. 115, 126 (1989); *Texas v. Johnson*, 491 U.S. 397 (1989); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984). Content-based laws rarely survive exacting scrutiny. *Playboy Entertainment* at 120 S.Ct. 1889. The secondary effects logic set forth in a great many adult entertainment cases simply has no application here. The O'Brien-secondary[7]

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[7] *United States v. O'Brien*, 391 U.S. 367 (1968).

effects doctrine only applies if the ordinance is subject to intermediate scrutiny **not** strict scrutiny. "We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech." *Playboy Entertainment*, 120 S. Ct. at 1887 (citations omitted).

Additionally, this court should issue a writ of certiorari because several courts have split on this issue. The cases Ms. Gatena cited are *Salem Inn, Inc. v. Frank*, 522 F.2d 1045, 1049 (2nd Cir. 1975) and *Nakotomi Inv., Inc. v. City of Schenectady*, 949 F.Supp. 988, 999-1000 (N.D. N.Y. 1997). The cases the county primarily cites to and relies upon are *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 376-378 (5th Cir. 1998); *Farkas v. Miller*, 151 F.3d 900, 905 (8th Cir. 1998); and *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994).

The District Court also relied upon the *Barnes* decision in ruling against Ms. Gatena. *Gatena v. Orange County*, 80 F.Supp. 2d 1331 (M.D. FL 1999). However, if this Court approved preferential treatment, why did it debate the issue so vigorously in *Pap's* while opting to decide it another day on a better record? In fact, this preferential treatment issue was not before the Court in *Barnes* because the Indiana statute before the Court in *Barnes* banned **all** nudity, and the Indiana Supreme Court had so ruled in *State v. Baysinger*, 397 N.E.2d 580, 587-588 (Ind. 1979); *Erhardt v. State*, 463 N.E.2d 1121 (Ind. 4th DCA 1984), reversed 468 N.E.2d 224 (Ind. 1984). See *Barnes*, 501 U.S. 564, n. 1; 564, 566; and Justice Scalia's concurrence at 574, n. 2.

II. The bona fide performance exemption is unconstitutionally vague because no person of common intelligence could discern the words' meaning; nor can a police officer on the beat be expected to understand how this subjective verbiage is to be constitutionally and criminally enforced.

Certain types of nudity are exempted from the Ordinance's prohibitions. Nudity is permitted under § (f)(2) of the ordinance if:

> [I]t constitutes a part of a ***bona fide*** live communication, demonstration or performance by a person wherein such nudity is ***expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain*** . . . (emphasis added).

How is a law enforcement officer, presumably untrained in the arts, supposed to determine whether the nudity in a performance is part of a "bona fide" live communication? If he does decide that it is "bona fide," how is he to determine whether it is "expressive conduct" that is "incidental to and necessary for the conveyance . . . of a . . . message"? How is he to decide whether the message is "genuine"? How is he to determine whether the message is a "mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain"? In truth, no law enforcement officer could answer these questions, and that is why the ordinance is void for vagueness.

Vague laws are laws which do not afford a person of ordinary intelligence a reasonable opportunity to know what is prohibited. In *Grayned v. City of Rockford*, 498 U.S. 104, 108-9 (1972),[8] the Court explained why such laws cannot be tolerated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. **A vague law impermissibly delegates basic policy matters to *policemen, judges*, and *juries* for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.**

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[8] The void for vagueness test is actually divided into three parts. (1) notice, (2) whether there are sufficient guidelines to insure clarity in enforcement and (3) whether the ordinance impinges upon the First Amendment. *Grayned v. City of Rockford*, 498 U.S. 104, 109 (1972); *Reno v. ACLU*, 521 U.S. 844 (1997); *Coates v. Cincinnati*, 402 U.S. 611 (1971). Generally the courts are more concerned with arbitrary enforcement and the application of a law. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *City of Chicago v. Morales*, 527 U.S. 41, 86 (1999) [J. O'Connor concurring].

Grayned v. City of Rockford, 498 U.S. 104, 109 (1972) (Emphasis added); *Reno v. ACLU*, 521 U.S. 844 (1997) [inherently vague laws cannot be left to case by case adjudication].

There are many cases from this Court, both before and after *Grayned*, which state and restate the same principles concerning statutory vagueness[9]. Those cases are extremely important in this case, but of far greater importance is the fact that the principles reiterated in *Grayned* apply to criminal statutes which do not involve the First Amendment. When First Amendment rights are implicated, the test of vagueness applies **with even greater force** than with criminal statutes generally, and stricter standards of permissible statutory vagueness are always applied to a statute having a potentially inhibiting effect on speech. *Smith v. Goguen*, 415 U.S. 566 (1973); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Hynes v. Oradell*, 425 U.S. 610 (1976). The reasons for this stricter standard have

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[9] *Reno v. ACLU*, above, [prohibitions of "indecent and patently offensive" communications facially over broad]; *Gooding v. Wilson*, 405 U.S. 518 (1972) ["opprobrious words or abusive language, tending to cause a breach of the peace," unconstitutionally vague]; *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) [film classification as to whether same is suitable for youths unconstitutionally vague]; *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955) [words, "moral and proper" and "cruel, obscene, indecent or immoral, or such as tends to debase or corrupt morals" unconstitutionally vague film standard]; *Superior Films, Inc. v. Department of Education*, 346 U.S. 587 (1954) [film standard relating to "moral, educational or amusing and harmless" unconstitutionally vague classification]; *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) [film standard using the term "sacrilegious" unconstitutionally vague].

been frequently stated by the Court. In *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), the Court held:

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . **Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with** ***narrow specificity.***

371 U.S. at 432-33 (emphasis added).

This Court has repeated this refrain many times.

> Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. **If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.**

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982). See also *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Gooding v. Wilson*, 405 U.S. 518 (1972).

An exotic dancer of ordinary intelligence could never determine whether her nude dancing or theatrical performance fell within the county's exemption. She would be compelled to do whatever law enforcement authorities

told her to do. There is no way to objectively determine if nudity is part of a "bona fide" performance; if it is "expressive;" if it is necessary for the conveyance of a "genuine" message; or if it is a "mere guise or pretense" utilized for profit or gain. Such laws have been repeatedly condemned by this Court.

The nudity exemption set out in § (f)(2) of the ordinance is obviously an attempt by the Board of County Commissioners of Orange County to permit nude performances and nude dancing under some circumstances – **circumstances which meet their approval**. Why would a local government seek to allow nudity under some circumstances but not others – adult nightclubs for example? Does this attitude reflect a kind of social elitism whereby the educated, upper classes are allowed to enjoy nudity but not others? **Is it an attempt to distinguish "high" art from "low" art?** Judge Oakes of the Second Circuit Court of Appeals opined in an early nude dancing case, "while the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some 'entertainment' with his beer or shot of rye." *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n. 3 (2nd Cir. 1974), modified 422 U.S. 922 (1975).

In applying the foregoing rules to § (f)(2) of the ordinance, its vagueness becomes glaringly obvious. As noted above, how is any law enforcement officer supposed to determine whether a "live communication, demonstration or performance" is "bona fide"? Or how is he

to determine whether nudity is "incidental to and necessary for" the conveyance of a message? And how is he to determine whether the particular message is "genuine" or just a guise to exploit nudity for profit? No reasonable person could argue that a penal statute which allows policemen to answer such questions on an ad hoc basis is a statute which regulates with "**narrow specificity**." *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433 (1963).

CONCLUSION

Attempts by local governments to make a legal distinction between expressive and non-expressive nudity should never be permitted. The inevitable result of language such as that employed in § (f)(2) of the ordinance is arbitrary and discriminatory enforcement based upon the predilections of the particular law enforcement officer, i.e., the precise evil which our rules against vague laws are supposed to prevent. Permitting policemen, local legislators and judges to play art critic and censor will always result in the enforcement of traditional notions of "educated taste," thereby allowing the upper classes to enjoy erotica while forbidding the *hoi polloi* to do the same. It is an arrogant, paternalistic form of censorship and it should never be tolerated by this Court or any court in this country. This Court has previously recognized that one man's vulgarity may be another's lyric and that the government should keep its nose out of matters involving taste and style.

> [W]e think it is largely because governmental officials cannot make principled distinctions in

> this area that the Constitution leaves matters of taste and style so largely to the individual.

Cohen v. California, 403 U.S. 15, 25 (1970).

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

KIM GATENA,

Petitioner,

vs.

COUNTY OF ORANGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

Page

Appendix A – Opinion of the United States Court of Appeals for the Eleventh Circuit Filed July 11, 2000 ..... 1a

Appendix B – Order of the District Court, Middle District, Orlando, Florida Filed November 5, 1999 ..... 5a

Appendix C – Order of the United States Court of Appeals for the Eleventh Circuit Filed September 18, 2000 ..... 31a

Appendix D – Certified Copy of Section 26-26, Orange County Code 33a

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14905

D.C. Docket No. 98-00417-CIV-ORL-22

KIM GATENA,

Plaintiff-Appellant,

versus

COUNTY OF ORANGE,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed July 11, 2000)

Before BLACK, CARNES and KRAVITCH, Circuit Judges.

PER CURIAM:

Appellant Kim Gatena filed suit against Appellee Orange County seeking a declaratory judgment and permanent injunction prohibiting Appellee from enforcing its public nudity ordinance ("the ordinance") against Appellant. The district court granted summary judgment

to Appellee. On appeal, Appellant alleges: (1) the ordinance is unconstitutionally vague, and (2) the ordinance is content-based in violation of the First Amendment.[1] We affirm.

We review a district court's grant of summary judgment de novo. *See Schoenfeld v. Babbitt*, 168 F.3d 1257, 1264 (11th Cir. 1999). We will affirm the district court if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir. 1990).

Appellant first claims one of the exemptions to Appellee's ordinance is unconstitutionally vague. The challenged exemption permits public nudity that constitutes

> part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain.

Orange County Code § 26-26(f)(2)(1992). This exemption is virtually identical to an exemption from the public nudity ordinance discussed in *Café 207, Inc. v. St. Johns County*,

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[1] Appellant also contends the district court erred in ordering Appellant's counsel to pay $500 for failing to comply with a scheduling order. We find no abuse of discretion in the district court's order. *See Barnes v. Dalton*, 158 F.3d 1212, 1214 (11th Cir. 1998).

856 F. Supp. 641 (M.D. Fla. 1994).[2] In *Café 207*, the district court concluded the exemption was not unconstitutionally vague, noting "an anti-nudity ordinance which is plainly intended to carve out non-obscene and therefore protected displays of nudity in artistically valuable theatrical performances cannot be condemned for facial vagueness, otherwise the obscenity laws, which must undertake the same chore . . . would necessarily suffer the same condemnation." *Id.* at 650. The district court further determined "[m]erely because it is impractical if not impossible to precisely describe in words all of the types of nude performances falling within the protection of the First Amendment does not make the exception unconstitutionally vague." *Id.* at 649.

We affirmed the district court's judgment in *Café 207* for the reasons stated in its opinion. *See Café 207, Inc. v. St. Johns County*, 66 F.3d 272, 273 (11th Cir. 1995). Thus, the law of this Circuit is that stated in the district court's opinion. Appellee's ordinance is identical in every relevant aspect to the ordinance upheld against a vagueness challenge in *Café 207*. We therefore find *Café 207* to be controlling and conclude Appellee's ordinance is not unconstitutionally vague.

Appellant also contends the district court erred in treating the ordinance as a content-neutral regulation subject to the four-part test expressed in *United States v.*

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[2] The ordinance in *Café 207* exempted nudity that could not be "legally" prohibited, while Appellee's ordinance exempts nudity that cannot be "constitutionally" prohibited. There is no other difference between the exemptions.

O'Brien, 88 S. Ct. 1673 (1968). Appellant argues the ordinance is content-based, and thus violates the First Amendment. We again find *Café 207*, in which the virtually identical ordinance was deemed content-neutral and sustained as constitutional under the *O'Brien* test, to be controlling and dispositive of Appellant's claim. *See Café 207*, 856 F. Supp. at 644-46.

Further, in its recent decision in *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382 (2000), the Supreme Court clarified that "government restrictions on public nudity . . . should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech," as long as the restrictions are "aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments . . . and not at suppressing the erotic message conveyed by . . . nude dancing." *Id.* at 1391-92. In this case, the record indicates Appellee passed the ordinance because it was concerned with the harmful secondary effects associated with public nudity. Following *Pap's*, this focus renders the ordinance content-neutral. *See id.* The district court therefore was correct to analyze the ordinance under the *O'Brien* test. We further agree with the district court that the ordinance passes the *O'Brien* test. Summary judgment thus was properly granted to Appellee on Appellant's First Amendment claim.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Kim Gatena,

Plaintiff,

-vs-

County of Orange,

Case No. 98-417-Civ-Orl-22B

Defendant.

ORDER

(Filed Nov. 5, 1999)

I. Introduction.

This cause is before the Court on a challenge to the constitutionality of section 26-26 of the Orange County Code, which prohibits public nudity with some exceptions. Plaintiff, Kim Gatena ("Gatena"), is a nude dancer. Gatena believes that a nude woman engaged in dance, combined with music, is an art form which conveys "an important message of sexuality and eroticism." [Compl. § IV.C.] Gatena claims that Orange County's public nudity ordinance unconstitutionally infringes upon her right to continue in her chosen profession, expand her livelihood, and promote her message of eroticism. Gatena's challenges to the Code are facial and as applied.

Gatena and the Defendant, County of Orange ("the County"), have filed cross-motions for summary judgment. (Docs. 41 & 61.) The parties believe there are no material issues of fact to be tried. *See* Pretrial Statement

(Doc. 70). Upon considering the pleadings and other supporting material submitted by both parties, the Court determines that the County is entitled to summary judgment on all of Gatena's claims.

II. Undisputed Facts.

On October 27, 1992, the Orange County Board ("the Board") adopted Ordinance No. 92-33 ("the Ordinance"), subsequently codified at § 26-26 of the Orange County Code ("OCC"), entitled "Offenses Involving Public Peace and Order, Public Nudity." The Ordinance bans public nudity, subject to certain exemptions. The term "nude" means

> to display or expose the male or female genitals, public area, or the female breast with less than a fully opaque covering of any part of the areola and nipple, or the showing of the covered male genitals in a discernibly turgid state. . . .

OCC § 26-26(d)(2). A "public place" includes, but is not limited to

> a street, sidewalk, park, beach, business or commercial establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, cabaret, or meeting facility utilized by a religious, social, fraternal or similar organization.

Id. § 26-26(d)(5).

Under the Ordinance, persons may appear nude in the following circumstances:

> (1) When a person appears nude in a public place provided or set apart for nudity. . . . ;[1] or
>
> (2) When the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain. . . . ; or
>
> (3) When the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or Florida Constitution.

OCC § 26-26(f)(1)(2) & (3) (footnote added).

Gatena has never been arrested for violating the Ordinance. However, since the Ordinance's passage, she has ceased dancing nude. Gatena asserts that the Ordinance prevents her from fulfilling her desire to perform nude in an adult setting or in a non-adult venue in a play

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[1] Public places "set apart for nudity" include public restrooms, showers, locker rooms, hotels, motels, etc.

or skit. [Gatena Depo. at 77.][2] Gatena contends that the Ordinance's "bona fide live communication" exemption is vague and unclear. As a result, Gatena fears that she may be subject to prosecution for engaging in nude performances which she deems to be constitutionally protected. *Id.* at 79, 86-88.

III. Summary Judgment Standard.

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The party seeking summary judgment bears the initial burden of identifying for the district court those portions of the record 'which it believes demonstrate the absence of a genuine issue of material fact.' " *Cohen v. United American Bank of Cent. Fla.*, 83 F.3d 1347, 1349 (11th Cir. 1996) (quoting *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1396, *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995)). "There is no

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[2] In response to the County's first set of interrogatories, Gatena stated:

> I would like to dance nude in a night club. In the alternative, I would like to perform or dance nude in a theatrical night club. I would also be interested in owning or operating a theatrical night club where nude theatrical and dance productions occur. The productions could run the gambit [sic] from dance-theater including parodies, skits and sexual satire.

[Pl.'s Mot. Summ. J. at 10-11.]

genuine issue for trial unless the non-moving party establishes, through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor." Cohen, 83 F.3d at 1349. The Court considers the evidence and all inferences drawn therefrom in the light most favorable to the non-moving party. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh'g and reh'g en banc denied*, 16 F.3d 1233 (11th Cir. 1994).

IV. Analysis.

Gatena raises three separate claims in her complaint seeking a declaratory judgment and permanent injunction prohibiting the County and its agents from enforcing the Ordinance. First, Gatena claims that facially and as applied, the Ordinance is content or viewpoint based in violation of the First and Fourteenth Amendments to the United States Constitution. Second, Gatena argues that the Ordinance is unconstitutionally vague[3] (both facially and as applied) in violation of the First, Fifth, and Fourteenth Amendments to the Constitution. Finally, Gatena argues that the Ordinance's exemptions for certain types of nudity are arbitrary and capricious. The County defends the Ordinance's constitutionality. Additionally, the County preliminarily raises various justiciability issues, including whether Gatena has standing to bring her claims and whether her claims are ripe for review.

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[3] Gatena's vagueness challenge is based on the Ordinance's "bona fide live communication" language.

A. Justiciability of Gatena's claims.

As a threshold matter, the County challenges whether Gatena's claims are justiciable. Specifically, the County argues that Gatena's as-applied challenge to the Ordinance is not ripe for review and that Gatena lacks standing to bring overbreadth[4] and vagueness challenges (both facial and as applied). The County focuses its justiciability arguments on Gatena's ability to challenge the *exemptions* listed in § 26-26(f) of the Ordinance. In so doing, the County misapprehends the gist of Gatena's claims.

Gatena challenges not only the language contained in the exemption, but the Ordinance as a whole. Gatena complains that "[f]acially and as applied, the ordinance is content or viewpoint based rather than content or viewpoint neutral in violation of the First and Fourteenth Amendments. . . . " *See* Pl.'s Compl. at 4 (emphasis omitted). Gatena further states that "[u]nless the court prevents the enforcement of the ordinance, [she] will be denied her constitutional right to dance nude – both for

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[4] Gatena's complaint pleads an overbreadth challenge. [Compl. § IV.K.] However, Gatena does not make an overbreadth argument in her motion for summary judgment, nor does she list overbreadth as an issue of law to be determined by the Court. [Pretrial Statement § X.A.] Therefore, the Court deems Gatena's overbreadth argument to be waived. In any event, the Ordinance is not overbroad. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Café 207, Inc. v. St. Johns County*, 66 F.3d 272, 273 (11th Cir. 1995), *aff'g*, 856 F.Supp. 641 (M.D. Fla. 1994); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994) (striking down an ordinance banning all public nudity as overbroad because it did not contain and [sic] exception for serious artistic entertainment).

herself as well as her admirers and patrons." *Id.* She further argues in her motion for summary judgment that "[t]he ordinance should not be applied in an arbitrary or discriminatory manner. It should be fair. If nude performances occur at other venues (sanctioned by the county), they should likewise be permitted in an adult nightclub setting." [Pl.'s Mot. Summ. J. at 8.] In analyzing whether Gatena has standing to bring facial and as-applied challenges, the Court considers Gatena's objection to the validity of the entire Ordinance. *See National Advertising v. City of Fort Lauderdale*, 934 F.2d 283 (11th Cir. 1991).

The Supreme Court has articulated three constitutional standing requirements: injury, causation, and redressability. *See Northeastern Florida Contractors v. Jacksonville*, 506 U.S. 656 (1993). Gatena meets these three requirements. The Ordinance's ban on public nudity clearly covers persons employed as nude dancers in the adult entertainment industry. Gatena wishes to dance nude (in a non-obscene manner) as a form of public entertainment within the Orange County adult entertainment industry. *See* Pl.'s Compl. at 2. Gatena wants to continue in her chosen profession (nude erotic dancer), expand her livelihood, and promote the "important message of sexuality and eroticism." *Id.* The ban on nudity prevents Gatena from doing so, lest she face prosecution. Accordingly, the County's conduct in passing the Ordinance has injured Gatena. Such an injury could be redressed if Gatena obtains a favorable federal court decision, that is, if the Court were to find the entire Ordinance, including the exemption language, unconstitutional.

The County argues that Gatena lacks standing because she has not been arrested or threatened with prosecution under the Ordinance. However, Gatena's interest in engaging in the Ordinance's prohibited conduct can establish standing even though the threat of enforcement arises from the very existence of the statute. *See Leverett v. City of Pinellas Park*, 775 F.2d 1536, 1539 (11th Cir. 1985) (citing *Hardwick v. Bowers*, 760 F.2d 1202, 1206 (11th Cir. 1985)). Moreover, "[a] court can be most certain that a constitutional challenge grows out of a genuine dispute where the allegedly unconstitutional statute interferes with the way the plaintiff would normally conduct his or her affairs." *See id.* at 1539 (citation omitted); *see also Florida League of Professional Lobbyists v. Meggs*, 87 F.3d 457, 459 (11th Cir. 1996); *Cannabis Action Network v. City of Jacksonville Beach*, 20 F.Supp.2d 1317, 1322-1323 (M.D. Fla. 1998). It is undisputed that the Ordinance interferes with Gatena's desire to dance in the nude. Thus, the Court finds that Gatena has standing to pursue her claims.

Additionally, Gatena's claims are ripe for review. The ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes. *See Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967) (holding that action was ripe before prosecution occurred where appellants faced choice between complying with possibly void regulation and risking "serious" civil penalties). Gatena may seek pre-enforcement review even though she has not been arrested under the Ordinance. It is well settled that a party need not await prosecution before challenging the validity of a statute. *See, e.g., Steffel v. Thompson*, 415 U.S.

452, 462 (1974) ("[T]he hapless plaintiff [must choose] between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."). Furthermore, the doctrine of ripeness is more loosely applied in the First Amendment context. *See Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997) ("the injury requirement is most loosely applied when a plaintiff asserts a violation of First Amendment rights based on the enforcement of a law, regulation or policy"); *Cheffer v. Reno*, 55 F.3d 1517, 1523 n.12 (11th Cir. 1995).[5]

B. The Ordinance is not content or viewpoint based.

There can be no doubt that nude dancing is expressive conduct entitled to a modicum of First Amendment protection. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (finding that "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment"); *see also Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981); *California v. LaRue*, 409 U.S. 109, 118 (1972). Gatena contends that the Ordinance violates the First Amendment's protection of nude dancing because it is content or viewpoint based. The gravamen of Gatena's

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[5] The County cites *Digital Properties, Inc.* to support its argument that Gatena's First Amendment claim is not ripe. *Digital Properties, Inc.* is distinguishable. In that case, the court held the plaintiff's claims were not ripe because the plaintiff failed to exhaust his administrative remedies under a licensing scheme.

complaint lies in the narrowing construction Orange County has placed on the Ordinance. The Ordinance bans all nudity except, *inter alia*, where the act of being nude

> constitutes part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain.

OCC § 26-26(f)(2). Gatena argues that this exception effectively bans nudity in adult entertainment establishments but not in "high-culture" establishments like the theater or ballet. Such a distinction, Gatena argues, renders the Ordinance content and viewpoint based in violation of the First Amendment because "the government cannot selectively legislate the places where nude dancing is permitted depending on whether it believes the expression at issue is 'bona fide' or 'legitimate.' " (Doc. 42 at 1.) Gatena's argument is without merit in light of the Supreme Court's opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and the Eleventh Circuit's per curiam decision in *Café 207, Inc. v. St. Johns County*, 66 F.3d 272, 273 (11th Cir. 1995), *aff'g*, 856 F.Supp. 641 (M.D. Fla. 1994).

In *Barnes*, the Supreme Court tested the constitutionality of Indiana's public indecency statute on a challenge from two adult entertainment establishments and individual dancers employed therein. *See Barnes*, 501 U.S. at 562-63. Indiana's law facially banned public nudity "across the board." *Id.* at 566. Notwithstanding that fact,

the Court observed that "[t]he Indiana Supreme Court appeared to give the public indecency statute a limiting construction to save it from a facial overbreadth attack. . . . " *Id.* at 564 n.1. In that regard, when testing the statute's validity, the Indiana Supreme Court held that "[t]here is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *Id.* (quoting *State v. Baysinger*, 272 Ind. 236, 247 (1979)). Despite this narrowing construction, the *Barnes* Court determined that the Indiana law should be subject to intermediate scrutiny under the four-part test announced in *United States v. O'Brien*, 391 U.S. 367 (1968).

The *O'Brien* test is appropriately utilized where "speech" and "nonspeech" elements are combined in the same course of conduct. *O'Brien* was arrested for burning his draft card on the steps of a Boston courthouse before a large crowd. *See id.* at 369. The law under which *O'Brien* was indicted prohibited the wilful and knowing mutilation of draft cards. *See id.* at 370. *O'Brien* argued that the burning of his draft card constituted protected "symbolic speech;" thus, the law prohibiting the destruction of draft cards unconstitutionally interfered with his First Amendment freedom of expression. *See id.* The Court rejected *O'Brien*'s argument that the First Amendment protects all modes of communication of ideas by conduct, stating:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the

> alleged communicative element in *O'Brien*'s conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

Id. at 376. The *O'Brien* Court then enunciated a four-part test to determine whether a government regulation which incidentally limits First Amendment freedoms is sufficiently justified.[6]

In *Barnes*, the Court chose to utilize the *O'Brien* test in analyzing the Indiana law's validity, agreeing that Indiana's restriction on nude dancing was a valid time, place, or manner restriction. *See Barnes*, 501 U.S. at 566. The Court noted that Indiana's law did not ban nude dancing *per se*, rather, it banned all public nudity. *Id.* In other words, the Court found the Indiana law in question to be content neutral, meriting intermediate scrutiny to determine whether the incidental limitation on protected expression, i.e., nude dancing, was sufficiently justified

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[6] Under the four-part test, a government regulation is sufficiently justified: 1) if it is within the constitutional power of the Government; 2) if it furthers an important or substantial governmental interest; 3) if the governmental interest is unrelated to the suppression of free expression; and 4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *See id.* at 367.

by the governmental interest. Applying *O'Brien*, the Court upheld Indiana's public indecency statute despite its incidental limitations on some expressive activity. *See id.* at 567.

Significant to the instant action is *Barnes'* treatment of the Indiana statute as content neutral. *Barnes'* two concurring opinions are especially enlightening on this point. Indeed, Justice Scalia wrote:

> Respondents also contend that the statute, as interpreted, is not content neutral in the expressive conduct to which it applies, since it allegedly does not apply to nudity in theatrical productions. . . . I am not sure that theater versus nontheater represents a distinction based on content rather than format, but assuming that it does, the argument nonetheless fails for the reasons the plurality describes, ante, at 564 n.1. . . .

Barnes, 501 U.S. at 574 n.2 (Scalia, J., concurring). Justice Souter further explained:

> the secondary effects rationale on which I rely here would be open to question if the State were to seek to enforce the statute by barring expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton*. . . . It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context

> of *Renton*-type adult entertainment was correlated with such secondary effects.

Id. at 584 n.2 (Souter, J., concurring) (citation omitted).

Gatena's argument that the Supreme Court would not have upheld the Indiana public nudity statute if it had "prohibited nude bar room dancing, while permitting dancing as part of a theatrical performance," is clearly wrong.[7] In fact, the Court indicated just the opposite when it noted that a public indecency statute without

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[7] Gatena mistakenly argues that *Barnes* does not apply here because the public indecency statute there banned all nudity "across the board." *Barnes*, 501 U.S. 560, 566 (1991). On the contrary, five Justices recognized that the Indiana Supreme Court imposed a limiting construction on the Indiana statute in *State v. Baysinger*, 272 Ind. 236, 247, 397 N.E.2d 580 (1979), much like the exemption language contained in the Ordinance here.

Gatena erroneously asserts that the Indiana Supreme Court later found in *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984), that nudity occurring during an erotic theatre performance fell within the public nudity prohibition. [Pl.'s Mot. Summ. J. at 3 n.1.] Gatena incorrectly reads *Erhardt*. In that case, a waitress and several other contestants appeared in the "Miss Erotica of Fort Wayne" contest held at a theater. *See Erhardt v. State*, 463 N.E.2d 1121, 1122 (Ind. App. 4 Dist. 1984). The contest included a dance competition during which Erhardt removed all of her clothing except a G-string and scotch tape criss-crossed over her nipples. *See id.* Erhardt was subsequently arrested and convicted under Indiana's public indecency statute. *See id.*

The Indiana Court of Appeals reversed Erhardt's conviction because there was no showing that Erhardt's conduct was lewd and because it found Erhardt's conduct was entitled to First Amendment protection. Judge Conover dissented because he believed Erhardt's conduct fell within the statute's prohibition and Erhardt failed to raise her First Amendment challenge timely. *Id.* at 1126-27. Agreeing with Judge Conover, the Indiana Supreme Court reversed the Court of Appeals and upheld

such a limiting construction may be subject to an overbreadth challenge. *See id.* at 564 n.1 & 584 n.2.

The Indiana public indecency law and Orange County's Ordinance define public nudity almost identically.[8] Both laws are subject to limiting constructions which permit certain forms of nude expression. Thus, following the analysis in *Barnes*, the exemption language at issue does not render the Ordinance content or viewpoint based.

On this point, the Court is also guided by the Eleventh Circuit's decision in *Café 207, Inc. v. St. Johns County*, 66 F.3d 272, 273 (11th Cir. 1995) (per curiam), *cert. denied*, 517 U.S. 1156 (1996). There, the court upheld a virtually identical ordinance when it affirmed District Judge William Terrell Hodges' decision in *Café 207, Inc. v. St. Johns County*, 856 F.Supp. 641 (M.D. Fla. 1994). The Eleventh Circuit affirmed Judge Hodges' decision by adopting the reasoning of his memorandum opinion; thus, Judge Hodges' opinion is highly instructive here.

Erhardt's conviction. 468 N.E.2d at 225. The Indiana Supreme Court did not disturb the indecency statute's limiting construction advanced in *Baysinger*, nor did it hold that Indiana's public nudity statute bans all nudity, regardless of its expressive content.

[8] Indiana's anti-nudity law prohibits persons from showing their buttocks, *see* Ind. Code § 35-45-4-1 (1988) (reproduced in *Barnes*, 501 U.S. at 569 n.2), while Orange County's ordinance does not, *see* OCC § 26-26(d)(2). Orange County's nudity law requires females to cover a larger portion of their breasts. *Compare* OCC § 26-26(d)(2) *with* Ind. Code § 35-45-4-1 (1988) (reproduced in *Barnes*, 501 U.S. at 569 n.2).

In 1992, the plaintiff in *Café 207* opened a nude entertainment restaurant called Café Erotica. Shortly thereafter, St. Johns County passed an ordinance which, with certain exceptions, banned all public nudity. The exceptions in the St. Johns ordinance are virtually identical to those listed in the Ordinance at issue. Orange County's "bona fide live communication" exception, on which Gatena primarily bases her First Amendment argument, is clearly modeled after the exemption language found in the St. Johns ordinance. St. Johns' ordinance does not proscribe public nudity

> [w]hen the conduct of being Nude can not legally be prohibited by this ordinance (i) because it constitutes a part of a bona fide live communication, demonstration or performance by such Person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a guise or pretense utilized to exploit nudity for profit or commercial gain. . . .

Id. at 648. Although the St. Johns ordinance contains this exemption language, Judge Hodges applied the *O'Brien* test to determine whether the ordinance's incidental limitation on expressive activity was sufficiently justified.

Gatena argues that *Barnes* and *Café 207*, applying *O'Brien*, do not control because those cases did not involve challenges based on content or viewpoint based discrimination. As discussed in *Barnes*, the intermediate scrutiny test set forth in *O'Brien* applies to laws regulating the *unprotected conduct* of public nudity, even if the

law has an incidental impact on some protected expression. Since the instant Ordinance is the same type found in *Barnes* and *Café 207*, it logically follows that the Ordinance is not content or viewpoint based, but is instead content neutral, requiring scrutiny under the Barnes-*O'Brien* framework.[9]

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[9] At least one post-*Barnes* court directly addressed the same content/viewpoint argument that Gatena raises here. In *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998), the owner of a night club featuring nude dancing claimed that the City of Jackson's public nudity ordinance was not content neutral because it allows persons "engaged in expressing a matter of serious literary, artistic, scientific, or political value" to appear nude in public. *See id.* at 366. The Fifth Circuit rejected this argument, explaining that even though the Indiana public indecency law in *Barnes* was given a similar limiting construction, a plurality of the Supreme Court and Justice Souter found the statute to be content neutral. *See id.* at 376. The appellate court stated:

> Acceptance of J&B's argument would place Jackson and other governments between Scylla and Charybdis: if a government attempted to ban all nudity, its enactment would become susceptible to an overbreadth challenge, while if it included an exception for some nudity, it would open itself up to a content neutrality challenge.

Id. at 377; *accord Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998) (upholding the constitutionality of Iowa's public nudity statute containing an exemption similar to the instant Ordinance). This Court agrees with the Fifth Circuit's reasoning and analysis in *J&B Entertainment, Inc.*

C. The Ordinance passes the *O'Brien* test.

In applying the *O'Brien* test, the Orange County Board of Commissioners' preambulatory findings inform the Court's analysis. The Ordinance contains the following relevant findings:

* * *

(5) The appearance of persons in the nude in public places which are not public places provided or set apart for nudity generally increases incidents of prostitution, sexual assaults and batteries, attracts other criminal activity to the community, encourages degradation of women, and facilitates other activities which break down family structure and values; and

(6) Without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes harmful conduct; and

(7) Orange County is a family oriented area; and

(8) Orange County is an area that is known for and whose economy is largely dependent upon its popular tourist and family oriented attractions. . . .

(9) Regulation of public nudity will protect and preserve the public health, safety and welfare of the people of Orange County. . . .

(10) Nonregulation of persons appearing nude in public places . . . would encourage entities and persons to exploit nudity for

> profit or commercial gain and to advertise outside of Orange County . . . and thus would encourage the influx . . . of persons seeking to observe and/or participate in such nudity, and to participate in the disorderly, harmful and illegal conduct that is associated therewith. . . .

OCC § 26-26(c)(5)(6)(7)(8)(9) & (10).

O'Brien's first prong requires that Orange County have the constitutional power to pass the Ordinance in question. Neither party challenges Orange County's power to pass an ordinance proscribing public nudity. "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals." *See Barnes*, 501 U.S. at 569 (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973)). The Ordinance lists as one of its findings the County's desire to regulate public nudity in order to "protect and preserve the public health, safety and welfare of the people of Orange County. . . . " OCC § 26-26(c)(9). Thus, the Ordinance meets *O'Brien*'s first element.

Second, the Ordinance serves a substantial and important governmental interest in protecting public order and property values and reducing the type of secondary effects associated with the type of nudity proscribed. A plurality in *Barnes* explicitly found that Indiana's public indecency statute, like the one at bar, "further[ed] a substantial government interest in protecting order and morality." *Barnes*, 501 U.S. at 569; *see also Café 207*, 856 F.Supp. at 644. Justice Souter, concurring in *Barnes*, relied on a different substantial governmental interest. He found that, because the state has a substantial

interest in eradicating the pernicious secondary effects associated with adult entertainment establishments,[10] legitimate restrictions on this type of entertainment are permitted even though they infringe on the protection afforded such nude dancing. *Id.* at 582. In Justice Souter's view:

> the interest asserted by petitioners in preventing prostitution, sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here.

Id. at 583.

Although much debate surrounds which of *Barnes'* opinions constitutes the law of the land, it is unnecessary to resolve that question here because the Ordinance survives scrutiny under the plurality and Justice Souter's concurrence (sanctioned by the Eleventh Circuit)[11] with respect to *O'Brien's* second prong.[12] The findings reveal

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[10] *See, e.g., Renton v. Playtime Theatres,* 475 U.S. 41 (1986) (upholding a city's zoning ordinance designed to prevent the occurrence of harmful secondary effects. including the crime associated with adult entertainment, by limiting the area in which adult films could be shown).

[11] *See International Eateries of America, Inc. v. Broward County,* 941 F.2d 1157, 1160-61 (11th Cir. 1991), *cert. denied,* 503 U.S. 920 (1992) ("[I]n order to uphold a statute regulating nude dancing, it is still necessary after *Barnes* that the statute meet the secondary effects test of Renton.")

[12] Implicit in this Court's finding that the instant Ordinance serves a substantial and important governmental interest is the

that, in passing the Ordinance, the Board was seeking to protect public order and property values. *See* OCC § 26-26(c)(5) & (9). Further, a transcript of the public hearing held on Orange County's proposed public nudity law confirms that the Board sought to prevent the harmful secondary effects associated with public nudity in adult entertainment establishments in Orange County. *See* Doc. 25, Ex. 2; OCC § 26-26(c)(5) & (10).

Under *O'Brien*'s third prong, the County's interest in prohibiting public nudity is unrelated to the suppression of free expression. Contrary to Gatena's argument, the purpose of the Ordinance is to control the adverse effects of public nudity, not expressive activity. The *Barnes* Court found a similar public indecency statute to be unrelated to suppression of free expression, stating that

> [t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at the beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the States seeks to prevent, whether or not it is combined with expressive activity.

Court's additional determination that the Ordinance is rationally related to a legitimate government purpose. Thus, the Court rejects Gatena's arbitrary and capricious challenge without further discussion. *See Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997) (arbitrary and capricious due process claim fails because the ordinances challenged are rationally related to a legitimate governmental interest).

Barnes, 501 U.S. at 571 [13] The Ordinance's findings reflect that public nudity is the perceived evil which Orange County seeks to address. *See* OCC § 26-26(c)(6) ("Without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes harmful conduct.") In fact, the Ordinance's incidental nudity exemption attempts to save some forms of expressive nudity which constitutionally cannot be prohibited. The Court finds that the County's substantial and important governmental interest in protecting order and morality and in combating the harmful secondary effects associated with adult nude dancing is unrelated to the suppression of free expression. *See Café 207*, 856 F.Supp. at 644.

Finally, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. The Ordinance's implicit

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[13] In concluding that the Indiana statute was unrelated to the suppression of expression, Justice Souter reasoned that:

> [b]ecause the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression. . . . [T]he "secondary effects" justification [here] means that enforcement of the Indiana statute against nude dancing is "justified without reference to the content of the regulated [expression]," *ibid.* (emphasis omitted), which is sufficient, at least in the context of sexually explicit expression, [footnote omitted] to satisfy the third prong of the *O'Brien* test.

Id. at 586.

requirement that nude dancers wear a scant amount of clothing has been approved as the "bare minimum" necessary to achieve the government's purpose. *See Barnes*, 501 U.S. at 572. Because the definition of "nude" in the Ordinance is worded virtually identically to the definition of "nudity" in the Indiana statute construed in *Barnes*, the rationale of *Barnes* with respect to *O'Brien*'s fourth prong applies in the case at bar. Accordingly, the Court finds that section 26-26 of the Orange County Code constitutionally regulates the conduct of public nudity, despite its incidental limitations on some expressive activity. Therefore, Gatena's First Amendment challenge to the Ordinance fails.

D. The Ordinance's "bona fide" exemption language is not vague.

Gatena complains that the "bona fide live communication" exception contained in the instant Ordinance is unconstitutionally vague. In *Café 207*, Judge Hodges examined whether almost identical language in the St. Johns ordinance was vague, Judge Hodges determined that

> [t]he exception was clearly intended to stake out those theatrical performances involving nudity with artistic value so as to be non-obscene and within the protection of the First Amendment. Merely because it is impractical if not impossible to precisely describe in words all of the types of nude performances falling within the protection of the First Amendment does not make the exception unconstitutionally vague . . . . [A]n articulated exception in an anti-nudity

> ordinance which is plainly intended to carve out non-obscene and therefore protected displays of nudity in artistically valuable theatrical performances cannot be condemned for facial vagueness, otherwise the obscenity laws, which must undertake the same chore (i.e., carving out non-obscene matter per *Miller [v. Calfornia,* [sic] 413 U.S. 15 (1973)] either as written or as construed) would necessarily suffer the same condemnation. . . . I conclude that the Ordinance is not unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment.

Café 207, 856 F.Supp. at 650 (footnote omitted). The Eleventh Circuit adopted Judge Hodges' reasoning. Accordingly, Gatena's identical vagueness challenge fails. *See Café 207 v. St. Johns County*, 66 F.3d 272, 273 (11th Cir. 1995).

V. Conclusion.

Based on the foregoing, it is ORDERED as follows:

1. Defendant, Orange County's Motion for Final Summary Judgment (Doc. 61), filed July 20, 1999, is GRANTED.

2. Ms. Gatena's Motion for Summary Judgment (Doc. 41), filed July 1, 1999, is DENIED.

3. Ms. Gatena's Motion to Exclude County Affidavit of Christopher R. Testerman and Reference in County's Response to Summary Judgment or, in the Alternative, Request to Consider County Charter, Section 704 In Light of County's Argument (Doc. 63), filed August 2, 1999; and Defendant,

Orange County's Motion in Limine as to Affidavits and Testimony of Brad Conway and Bill Miller Regarding Plays Within the City of Orlando and Memorandum of Law (Doc. 73), filed October 1, 1999, are DENIED as moot. The Court has examined the affidavits and determines that none of the facts presented in the various affidavits is relevant to the Court's analysis on the parties' summary judgment motions.

4. Gatena did not oppose Defendant, Orange County's Second Request for Judicial Notice, Notice of Filing and Memorandum of Law (Doc. 73), filed October 1, 1999. Accordingly, the request is GRANTED.

5. Defendant, Orange County's Motion for Rule 41(b) Dismissal, or, Alternatively Rule 16(f) Sanctions (Doc. 80), filed October 18, 1999, is GRANTED in part and DENIED in part. The motion is DENIED insofar as it seeks dismissal of the action. The motion is GRANTED insofar as it seeks sanctions under Rule 16(f). The Court reserved ruling on this motion in its Order of October 25, 1999, where it found that Plaintiff's counsel, Steve Mason, failed to obey two pretrial orders. Mr. Mason's failure to comply with the Case Management and Scheduling Order and the Court's Order of September 28, 1999 resulted in a waste of judicial resources. In addition, Mr. Mason's noncompliance caused the Defendant to waste its time and expense. Accordingly, pursuant to Fed. R. Civ. P. 16(f), the Court directs Mr. Mason to pay five-hundred dollars ($500) to the Defendant.

6. The Clerk shall enter a final judgment providing that the Plaintiff, Kim Gatena, is entitled to no relief on her claims against the Defendant, County of Orange, and further providing that the Defendant shall recover its costs of action.

7. The Clerk shall close this case.

DONE AND ORDERED in Orlando, Florida this 5th day of November, 1999.

/s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Parties
Administrative Law Clerk
Courtroom Deputy

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-14905-AA

KIM GATENA,

Plaintiff-Appellant,

versus

COUNTY OF ORANGE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Sept. 18, 2000)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, _____ F.2d _____).

Before: BLACK, CARNES and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

APPENDIX D

ORANGE COUNTY COMPTROLLER

[LOGO]

CERTIFICATION

STATE OF FLORIDA
§
COUNTY OF ORANGE

I HEREBY CERTIFY that the foregoing is a true and correct copy of an excerpt of the Orange County Code Book as it appears in the [sic] **Section 26, Chapter 26;** which is on file in the office of the Comptroller Clerk of the Board of County Commissioners.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal of the Board of County Commissioners, Orange County, Florida, this 1st day of **February 1999.**

Martha O. Haynie, County Comptroller
As Clerk of the Board of County Commissioners
Orange County, Florida

By: /s/ Jeanene Y. Wells [LOGO]
Jeanene Y. Wells
Assistant Deputy Clerk

ARTICLE II. OFFENSES INVOLVING PUBLIC PEACE AND ORDER*

Sec. 26-26. Public nudity.

(a) *Title.* This section shall be known as the "Orange County Public Nudity Ordinance."

(b) *Intent.* It is the intent of this section to protect and preserve the health, safety and welfare of the people of Orange County by prohibiting any person from knowingly or intentionally appearing nude in a public place, or knowingly or intentionally causing or permitting another person to appear nude in a public place, within the unincorporated area of Orange County, subject to the following three (3) exceptions:

(1) When such person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

(2) When the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or

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*Cross reference – Open containers of alcoholic beverages, § 4-26 et seq.

commercial gain (see, for example, *Barnes v. Glen Theatre, Inc.*, ___ U.S. ___ 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); and *Hoffman v. Carson*, 250 So. 2d 891 (Fla. 1971); or

(3) When the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or Florida Constitution.

(c) *Findings.* The board of county commissioners finds and determines as follows:

(1) Since the beginning of civilization, appearing nude in a public place which is not a public place provided or set apart for nudity has been considered improper (see *Moffet v. State*, 340 So.2d 1155, 1156, n.3 (Fla. 1977), which quotes Genesis 3:7 (King James)); and

(2) Appearing nude in a public place which was not a public place provided or set apart for nudity was a criminal offense at common law and was considered an act *malum en se* (wrong in itself); and

(3) Appearing nude in a public place which is not a public place provided or set apart for nudity is engaging in conduct which often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby; and

(4) Appearing nude in a public place which is not a public place provided or set apart

for nudity is still subject to general disapproval by the people of Orange County; and

(5) The appearances of persons in the nude in public places which are not public places provided or set apart for nudity generally increases incidents of prostitution, sexual assaults and batteries, attracts other criminal activity to the community, encourages degradation of women, and facilitates other activities which break down family structures and values; and

(6) Without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes harmful conduct; and

(7) Orange County is a family oriented area; and

(8) Orange County is an area that is known for and whose economy is largely dependent upon its popular tourist and family oriented attractions, such as the Magic Kingdom, EPCOT Center, Sea World, Disney-MGM Studios, Universal Studios; and

(9) Regulation of public nudity will protect and preserve the public health, safety and welfare of the people of Orange County by restricting, to the fullest extent allowed by the United States Constitution and Florida Constitution, the act of being nude to non-public places or public places provided or set aside for nudity; and

(10) Nonregulation of persons appearing nude in public places which are not public places provided or set apart for nudity

within the unincorporated area of Orange County would encourage entities and persons to exploit nudity for profit or commercial gain and to advertise outside of Orange County and the State of Florida the availability of and opportunity for nudity in public places which are not places provided or set apart for nudity within the unincorporated area of Orange County, and thus would encourage the influx into the unincorporated area of Orange County of persons seeking to observe and/or participate in such nudity, and to participate in the disorderly, harmful and illegal conduct that is associated therewith, thereby increasing injuries and damages to the people of the unincorporated area of Orange County who will be the victims of such increased disorderly, harmful and unlawful conduct; and

(11) The prohibitions contained herein are the most reasonable and minimum restrictions required so as to regulate conduct which is adverse to public order within the unincorporated area of Orange County, when such conduct occurs in a public place which is not a public place provided or set apart for nudity; and

(12) States may regulate the conduct of appearing nude in public places which are not public places provided or set apart for nudity (see *Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991)); and

(13) The exemptions contained in this section provide adequate protection to persons

who, without such exemptions, might be prevented or discouraged by this section from exercising constitutionally protected rights; and

(14) This section regulates conduct, not speech.

(d) *Definitions.*

(1) *Entity* means any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

(2) *Nude* means to display or expose the male or female genitals, pubic area, or the female breast with less than a fully opaque covering of any part of the areola and nipple, or the showing of the covered male genitals in a discernibly turgid state. For purposes of this definition, body paint, body dye, a tattoo, latex, or any similar substances shall not be considered an "opaque covering."

(3) *Person* means any human being at least ten (10) years of age.

(4) *Public place provided or set apart for nudity* means an enclosed public restroom, an enclosed functional shower or locker room facility, an enclosed sauna, a motel room or hotel room designed and intended for sleeping accommodations, or at the location of a bona fide private club whose membership as a whole engages in social nudism or naturalism (a nudist resort or camp), and any similar public places in

which nudity is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein.

(5) *Public place* means any location open to the common and general use, participation or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street sidewalk, park, beach, business or commercial establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, cabaret, or meeting facility utilized by a religious, social, fraternal or similar organization.

(e) *Public nudity.* Subject to the exemptions set forth in subsection (f) below, it shall be unlawful for any person to knowingly or intentionally appear nude in a public place, or to knowingly or intentionally cause or permit another person to appear nude in a public place.

(f) *Exemptions.* The offense of public nudity contrary to subsection (e) above shall not occur in any of the following three (3) instances:

(1) When a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose

of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

(2) When the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, *Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); and *Hoffman v. Carson*, 250 So.2d 891 (Fla. 1971); or

(3) When the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or Florida Constitution.

(g) *Violation of subsection (e).* Whoever violates subsection (e) above may be punished as provided in section 1-9 of the Orange County Code.
(Ord. No. 92-33, §§ 1–7, 10-27-92)

(2)

Supreme Court, U.S.
FILED
DEC 15 2000
OFFICE OF THE CLERK

No. 00-786

IN THE

Supreme Court of the United States

KIM GATENA,

Petitioner,

v.

COUNTY OF ORANGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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20 pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iv
Statement of the Case	1
A. Contrary to Gatena's Claim, the Eleventh Circuit Held That the Public Nudity Ordinance Was Content Neutral.	1
B. Contrary to Gatena's Argument, the Public Nudity Ordinance Uniformly Prohibits Public Nudity in All Public Places.	1
C. Contrary to Gatena's Argument, the Incidental Nudity Exemption Applies Uniformly to All Bona Fide Live Performances "Wherein Such Nudity Is Expressive Conduct Incidental to and Necessary for the Conveyance of a Genuine Message or Public Expression, and Is Not a Guise or Pretense Utilized to Exploit Nudity for Profit or Commercial Gain."	3
D. Gatena Was Never Charged with Violating the Ordinance and Presented No Evidence Regarding Any Application of the Ordinance.	4
E. Gatena's Supposed Personal Confusion Over the Meaning of the Term "Bona Fide" Is Legally Irrelevant.	5

Contents

Page

F. The Deposition Testimony Concerning the Constitutionality of the Ordinance Is Irrelevant. 5

Reasons for Denying the Writ 6

A. The Eleventh Circuit's Ruling Does Not Conflict with *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000). 7

B. The Eleventh Circuit's Ruling Does Not Conflict with Cases that Involve Content-Based Speech Regulations. 8

C. The Eleventh Circuit's Ruling Does Not Conflict with *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (2d Cir. 1975). 8

D. The Eleventh Circuit's Ruling Does Not Conflict with *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D. N.Y. 1997). 9

E. Gatena's Interpretation of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) is Incorrect. 9

F. The Eleventh Circuit's Ruling Rejecting Gatena's Vagueness Challenge Is Consistent with the Controlling Decision from the Eleventh Circuit. 10

Contents

Page

G. Regarding Gatena's Vagueness Challenge, Gatena Did Not Argue That There Was a Conflict in Decisions or That This Was an Issue of Great Importance. 12

Conclusion 14

TABLE OF CITED AUTHORITIES

Page

Cases:

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 9, 10

Café 207, Inc. v. St. Johns County, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996) 11

City of Erie v. Pap's A.M., 526 U.S. 277, 120 S. Ct. 1382 (2000) 1, 7

Grayned v. City of Rockford, 408 U.S. 104 (1972) 5, 12, 13

Nakatomi Investments, Inc. v. City of Schenectady, 949 F. Supp. 988 (N.D.N.Y. 1997) 9

Salem Inn, Inc. v. Frank, 522 F.2d 1045 (2d Cir. 1975) 8, 9

State v. Baysinger, 272 Ind. 236, 397 N.E. 2d 580 (1979) 10

United States v. O'Brien, 391 U.S. 367 (1968) 6

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 12

Cited Authorities

Page

Statutes:

Orange County Code § 26-26(d)(5) 2

Orange County Code § 26-26(e) 2

Orange County Code § 26-26(f)(2) 3, 6

STATEMENT OF THE CASE

A. Contrary to Gatena's Claim, the Eleventh Circuit Held That the Public Nudity Ordinance Was Content Neutral.

In its ruling, the Eleventh Circuit Court of Appeals in *Kim Gatena v. County of Orange*, 11th Cir. Case No. 99-14905 (July 11, 2000), held:

> In this case, the record indicates Appellee [Orange County] passed the ordinance because it was concerned with the harmful secondary effects associated with public nudity. *Following* [*City of Erie v.*] *Pap's* [*A.M.*, 120 S. Ct. 1382 (2000)], *this focus renders the ordinance content-neutral. See id.* The district court therefore was correct to analyze the ordinance under the *O'Brien* test. We further agree with the district court that the ordinance passes the *O'Brien* test.

Petition, p. 4a (emphasis added).

B. Contrary to Gatena's Argument, the Public Nudity Ordinance Uniformly Prohibits Public Nudity in All Public Places.

Contrary to the argument raised by Kim Gatena ("Gatena"), the Ordinance prohibits public nudity in every "public place," not just adult nightclubs. The Orange County Public Nudity Ordinance ("Ordinance") generally provides:

> (e) *Public nudity.* Subject to the exemptions set forth in subsection (f) below, it shall be unlawful for any person to knowingly or

> intentionally appear nude in a *public place*, or to knowingly or intentionally cause or permit another person to appear nude in a public place.

Petition, p. 39a, Orange County Code ("OCC") § 26-26(e).

The Ordinance defines "public place" to mean:

> any location open to the common and general use, participation or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street, sidewalk, park, beach, business or commercial establishment . . . , bottle club, hotel, motel, restaurant, night club, country club, cabaret, or meeting facility utilized by a religious, social, fraternal or similar organization.

Petition, p. 39a, OCC § 26-26(d)(5).

C. Contrary to Gatena's Argument, the Incidental Nudity Exemption Applies Uniformly to All Bona Fide Live Performances "Wherein Such Nudity Is Expressive Conduct Incidental to and Necessary for the Conveyance of a Genuine Message or Public Expression, and Is Not a Guise or Pretense Utilized to Exploit Nudity for Profit or Commercial Gain."

The Ordinance regulates the activity of being nude in public, subject to several exemptions, including the challenged "Incidental Nudity Exemption" codified in section (f)(2), which provides:

> (f) Exemptions. The offense of *public nudity* contrary to subsection (e) above shall not occur . . .
>
> (2) When the conduct *cannot constitutionally be prohibited* because
>
> [a] it constitutes a part of a bona fide live communication, demonstration or performance by such person
>
> [b] wherein such nudity is *expressive conduct*
>
> [c] *incidental to* and necessary for the conveyance or communication of a genuine message or public expression, and
>
> [d] is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, *Barnes v. Glen Theatre, Inc.*,

> [501] U.S. [560], 111 S. Ct. 2456, 115 L.Ed. 2d 504 (1991); and *Hoffman v. Carson*, 250 So.2d 891 (Fla. 1977)); . . . .

Petition, pp. 39a-40a (emphasis, line breaks and lettering added).

A plain reading of the Ordinance shows that Gatena's narrow and magnified focus on the term "bona fide," without a consideration of the surrounding text, creates a warped and strained interpretation of a clearly constitutional ordinance.

To illustrate the use of the term "bona fide," assume that a business advertised itself as a "totally nude" restaurant, requiring its waiters and waitresses to work in the nude. The business, in an attempt to circumvent the Public Nudity Ordinance, may argue that the workers were "performing" their jobs and claim that the Ordinance allows nude workers. Upon review of each part of the Ordinance and exemption, it is clear that the exemption is not applicable to this hypothetical situation. First, the workers were not engaging in a bona-fide performance at all. Second, the nudity was not expressive conduct. Third, the nudity was not incidental to and necessary for the conveyance of a message. Fourth, the business was exploiting nudity for profit.

D. Gatena Was Never Charged with Violating the Ordinance and Presented No Evidence Regarding Any Application of the Ordinance.

This case involves a constitutional attack by Gatena, an individual who was *never arrested* for violating the Ordinance (*Petition*, page 7a) and who presented *no evidence*

regarding any actual application of the Ordinance to anyone, let alone to herself. Gatena's argument that the Ordinance inappropriately applies preferentially to some events and not to others is a hypothetical and speculative argument based upon an incorrect reading of the Ordinance.

E. Gatena's Supposed Personal Confusion Over the Meaning of the Term "Bona Fide" Is Legally Irrelevant.

It matters not what Gatena subjectively thinks of the term "bona fide" in the Ordinance or its meaning, or even whether her own personal confusion is not feigned. Instead, the test to determine whether a law is unconstitutionally vague includes whether the law may be understood by "the person of ordinary intelligence." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

F. The Deposition Testimony Concerning the Constitutionality of the Ordinance Is Irrelevant.

Similarly, the deposition testimony concerning the meaning and interpretation of the Ordinance is also irrelevant.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit noted that the record established that the Ordinance was passed because Orange County was concerned with the harmful secondary effects associated with public nudity. As a result, the Eleventh Circuit determined that the Ordinance was a content neutral regulation that passed the four-part test expressed in *United States v. O'Brien*, 391 U.S. 367 (1968).

Gatena does not take issue with the fact that the Ordinance properly passed the *O'Brien* test. Instead, Gatena argues the Ordinance should have been reviewed under the strict scrutiny standard merely because the Ordinance contained an exemption that allowed public nudity that "cannot constitutionally be prohibited." *Petition*, p. 40a, OCC § 26-26(f)(2). In other words, Gatena is challenging the Ordinance because the Ordinance *allows* nudity that "cannot constitutionally be prohibited . . . ." An Ordinance that allows public nudity that cannot constitutionally be prohibited should not be held to be unconstitutional simply because the Ordinance excludes what the Ordinance cannot constitutionally encompass.

Regarding Gatena's vagueness challenge, Gatena did not argue that the Eleventh Circuit's ruling conflicts with the decision of another United States court of appeals on the same important matter or that the Eleventh Circuit's ruling conflicts with any relevant decisions of the United States Supreme Court. Orange County is unaware of any conflicts with decisions of another United States court of appeals or this Court. In rejecting Gatena's vagueness challenge, the Eleventh Circuit followed the decisions of its sister courts as well as this Court.

A. The Eleventh Circuit's Ruling Does Not Conflict with *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000).

The Eleventh Circuit's ruling followed this Court's recent decision in *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000). In its ruling, the Eleventh Circuit held:

> [I]n *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), the Supreme Court clarified that "government restrictions on public nudity . . . should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech," as long as the restrictions are "aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments . . . and not at suppressing the erotic message conveyed by . . . nude dancing." *Id.* at 1391-92. In this case, the record indicates Appellee passed the ordinance because it was concerned with the harmful secondary effects associated with public nudity. Following *Pap's*, this focus renders the ordinance content-neutral. *See id.* The district court therefore was correct to analyze the ordinance under the *O'Brien* test. We further agree with the district court that the ordinance passes the *O'Brien* test.

Petition, p. 4a.

B. The Eleventh Circuit's Ruling Does Not Conflict with Cases that Involve Content-Based Speech Regulations.

Cases involving content-based speech regulations are inapplicable to a content-neutral ordinance, like the Public Nudity Ordinance. In its ruling, the Eleventh Circuit held:

> In this case, the record indicates Appellee [Orange County] passed the ordinance because it was concerned with the harmful secondary effects associated with public nudity. *Following Pap's, this focus renders the ordinance content-neutral. See id.*

Petition, p. 4a (emphasis added).

C. The Eleventh Circuit's Ruling Does Not Conflict with *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (2d Cir. 1975).

In *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (2d Cir. 1975), the Town of North Hempstead, New York, enacted a regulation which made it unlawful to permit topless workers in a "cabaret, bar or lounge, dance hall, discotheque, restaurant or coffee shop," but not in an opera house, theater, playhouse or concert hall, ballet or movie. *Id.* at 1046-47. The *Salem Inn* court found:

> The Town [was] not concerned in its efforts to regulate this situation with obscenity or lewdness, the mere public or open display of nudity, the morals of minors . . . . Rather, the concern of the local government is with the conduct of the owners and operators of places serving either food or alcoholic beverage . . . .

Id. at 1047. As a result, the *Salem Inn* court held that the regulation was overbroad and violated the Equal Protection Clause.

In contrast, the Public Nudity Ordinance is not directed to specific establishments and applies to any "public place." Accordingly, Gatena's claim that the ruling conflicts with *Salem Inn* should be rejected.

D. The Eleventh Circuit's Ruling Does Not Conflict with *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D. N.Y. 1997).

In *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988, 990, n. 1. (N.D.N.Y. 1997), the District Court for the Northern District of New York found that:

> Schenectady's ordinance *targets only seven enumerated establishments*. Schenectady's ban is thus not a ban on nudity generally, but a targeted ban aimed at certain establishments.

Id. at 998 (emphasis added).

In contrast, the Public Nudity Ordinance is not directed at specific establishments, but rather applies uniformly to any "public place." Hence, the trial court's ruling in *Nakatomi* is clearly as distinguishable as *Salem Inn*.

E. Gatena's Interpretation of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) is Incorrect.

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the United States Supreme Court rejected a stripper's

challenge to the constitutionality of an Indiana public indecency statute which facially prohibited the conduct of public nudity across the board, see *Barnes*, 501 U.S. at 569, n.2, but which had been previously given a narrowing construction by the Indiana Supreme Court to exempt "some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *Barnes*, 501 U.S. at 569, n.1 (quoting *State v. Baysinger*, 272 Ind. 236, 247, 397 N.E. 2d 580, 587 (1979)). The Indiana statute resulted in exotic dancers at adult nightclubs having to wear pasties and G-strings.

As stated by the United States District Court, in *Gatena v. County of Orange*, 80 F. Supp. 2d 1331, 1337, n.7 (M.D. Fla. 1999):

> Gatena mistakenly argues that *Barnes* does not apply here because the public indecency statute there banned all nudity "across the board." *Barnes*, 501 U.S. 560, 566 (1991). On the contrary, five Justices recognized that the Indiana Supreme Court imposed a limiting construction on the Indiana Statute in *State v. Baysinger*, 272 Ind. 236, 247 (1979), much like the exemption language contained in the Ordinance here.

Petition, p. 18a, n.7.

F. The Eleventh Circuit's Ruling Rejecting Gatena's Vagueness Challenge Is Consistent with the Controlling Decision from the Eleventh Circuit.

The rejection of Gatena's vagueness challenge followed the controlling case law from the Eleventh Circuit.

The Eleventh Circuit held that the Incidental Nudity Exemption was "virtually identical to an exemption from the public nudity ordinance discussed in *Café 207, Inc. v. St. Johns County*, 856 F. Supp. 641 (M.D. Fla. 1994)." In *Café 207*, the district court concluded the exemption there was not unconstitutionally vague, stating:

> [A]n anti-nudity ordinance which is plainly intended to carve out non-obscene and therefore protected displays of nudity in artistically valuable theatrical performances cannot be condemned for facial vagueness, otherwise the obscenity laws, which must undertake the same chore . . . would necessarily suffer the same condemnation.

Id. at 650. The district court in *Café 207* reasoned, "[m]erely because it is impractical if not impossible to precisely describe in words all of the types of nude performances falling within the protection of the First Amendment does not make the exception unconstitutionally vague." *Id.* at 649.

The Eleventh Circuit affirmed the district court's ruling in *Café 207, Inc. v. St. Johns County*, 66 F.3d 272, 273 (11th Cir. 1995).

Finding the "Incidental Nudity Exemption" in Orange County's Public Nudity Ordinance to be "identical in every relevant aspect to the ordinance upheld against a vagueness challenge in *Café 207*," the Eleventh Circuit properly determined that *Café 207* was controlling and concluded that Orange County's Public Nudity Ordinance was not unconstitutionally vague. *Petition*, page 3a.

G. Regarding Gatena's Vagueness Challenge, Gatena Did Not Argue That There Was a Conflict in Decisions or That This Was an Issue of Great Importance.

Regarding Gatena's vagueness argument, Gatena did not and could not argue that there was a conflict in decisions among the courts as to the constitutionality of the Incidental Nudity Exemption, or that this is an issue of great importance.

The Eleventh Circuit's ruling is in accord with key decisions of this Court. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976), the United States Supreme Court refused to consider a vagueness challenge to an ordinance that regulated adult theaters. The vagueness challenge was based, in part, upon the phrase "characterized by an emphasis" on matters depicting, describing or relating to specified sexual activities or specified anatomical areas. Finding that any alleged vagueness did not affect the theaters, the United States Supreme Court held that:

> [W]e see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." . . . [S]ince the limited amount of uncertainty in the ordinances is easily susceptible to a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

Id. at 61.

Similarly, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the United States Supreme Court rejected a vagueness challenge to an antinoise ordinance, stating:

> [W]e conclude that the antinoise ordinance is not impermissibly vague. . . .
>
> . . . Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford ordinance are marked by "flexibility and reasonable breadth, rather than meticulous specificity," . . . , but we think it is clear what the ordinance as a whole prohibits.
>
> . . . As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible. . . .

Id. at 109-10 & 114.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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